

Testimony of:

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Pest Management & Fire Suppression Flexibility Act (H.R. 1749)

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I am a resident of Boise, Idaho, and have been a licensed attorney for 27 years. I am a shareholder in the Boise office of Moffatt, Thomas, Barrett, Rock, and Fields, Chartered. I have practiced in the areas of water rights, natural resources, and environmental law for over 20 years. I presently serve as Chairman of the Water Quality Task Force of the National Water Resources Association and am appearing on behalf of the Association and all of its 17 western state member associations. I am also appearing on behalf of three of my individual Idaho clients: 1) the Payette River Water Users Association which represents approximately 160,000 acres of irrigated farm land; 2) the Pioneer Irrigation District which serves approximately 34,000 acres of irrigated farmland and suburban/urban developments; and 3) the Settlers Irrigation District which serves approximately 13,000 acres of irrigated farmland and suburban/urban developments.

H.R. 1749, The Pesticide Management and Fire Suppression Flexibility Act is critically important legislation. As a result of activist environmental litigation and inaccurate judicial reasoning, federal appeals court decisions over the last four years have produced a number of erroneous interpretations of the language of the Federal Water Pollution Control Act, 33 U.S.C. Section 1251 *et seq.*, ("Clean Water Act"). The most significant of these incorrect decisions have concluded that authorized applications of beneficial, EPA approved, insecticides and herbicides violate the Clean Water Act if these beneficial substances come into contact with any water body or wetland area and a National Pollutant Discharge Elimination System Permit ("NPDES") has not been first obtained. These inaccurate interpretations of the Clean Water Act strayed far from the original intent of Congress in its adoption of the Act and subsequent amendments.

The consequences of these erroneous decisions have been dramatic. Spraying for West Nile Virus infected mosquitoes has been stopped in all of the states within the federal circuits where the decisions apply. In some instances, such as the small, rural community of Emmett, Idaho, the mosquito abatement district has been threatened with litigation by concerned residents because it has not sprayed, yet it has also been sued by an environmental activist for past spraying without an NPDES permit. But, after being requested by the district, the EPA refuses to issue an NPDES permit. EPA will not issue the permit because it has never done so, does not believe one can be issued under the Clean Water Act if the mosquito larvicide is applied in accordance with label restrictions, and it has adopted a national guidance to that effect.

This circumstance is being repeated throughout the states impacted by these erroneous judicial decisions. In California, environmental activists are suing a vector control district for aerial spraying over forest canopies because some particles of the mist of the insecticide may eventually contact surface streams of water within the areas sprayed. The same theory was used against the United States Forest Service which was spraying forested areas in Washington state to suppress an infestation of moths which were killing trees. Because some of the insecticide particles might settle in surface streams or rivers, the Ninth Circuit Court of Appeals agreed with the environmental activists argument that such activities required an NPDES permit. The spraying to save the trees from death caused by the insect infestation was halted.

Agriculture has been dramatically impacted in the states within the Ninth Circuit because of these decisions. Irrigated agricultural production suffers the most direct and costly impacts. Effective delivery of water requires periodic treatment of surface water canals and ditches to reduce growth of moss and other aquatic plants. Non-treatment will force water delivery

reductions, water blockage which can cause flooding, and inability to operate water regulation devices. A decision issued by the Ninth Circuit in 2001, produced the incorrect reading of the Clean Water Act which concluded application of EPA approved aquatic herbicides to irrigation canals and ditches required an NPDES permit to avoid violations of the Act. Now, every application of those herbicides must be covered by an NPDES permit in those states in which EPA has delegated Clean Water Act authority to the state. Before the Ninth Circuit decision, an NPDES permit had never been required by EPA for such activities. Even today, in Idaho, a state which does not have delegated authority for the Clean Water Act, the EPA policy is that an NPDES permit is not required for use of aquatic herbicides, as long as label restrictions are followed. However, this EPA policy does not protect Idaho water delivery entities from citizen suit exposure.

Yet in the other Ninth Circuit states, the impacts of the erroneous judicial interpretation are being felt in dramatic ways. Personnel costs have increased due to extremely stringent monitoring and reporting requirements under the new permits.

Acquiring the permits in the first instance required large expenditures of time and money for attorneys and consultants to assist the irrigation entities and private landowners. The costs of required water quality monitoring equipment and sample testing was enormous and continues to be added unnecessary costs, imposed upon production agriculture because of the misinterpretation of the Clean Water Act. Finally, any violation of the terms of the NPDES permit may be considered a violation of the Act, thereby subjecting the individual or entity to enforcement actions by the state agencies or a citizen suit by an environmental activist organization. A federal court judgment which mandates fines, payment of plaintiff attorney fees, and potential criminal penalties, can be the end consequence of these circumstances.

In addition to these impacts, water delivery systems for municipalities and recreational water bodies are effected by these incorrect judicial decisions. Any open storage reservoir for municipal water systems are subject to these decisions, thereby mandating NPDES permits for treatment of water within the reservoirs. More significantly, lakes, ponds, and other water bodies used for recreation are less likely to be treated for nuisance aquatic vegetation or invasive aquatic plant species, such as purple loosestrife. Without effective herbicide treatment, these non-native, invasive plant species can totally destroy the recreational value of water bodies. Additionally, they restrict and diminish quality aquatic habitat for native fish and other aquatic life.

Congress has the opportunity to solve the problems created by these erroneous judicial interpretations of the Clean Water Act. H.R. 1749 provides unambiguous clarification of the meaning of the Act to counter this spate of incorrect decisions. I encourage the members of the Subcommittee and the full Committee to restore the Clean Water Act to the proper balance which existed since its adoption until these judicial misinterpretations tilted the playing field so dramatically. Common sense suggests that wise use of beneficial chemical products, in accordance with the label restrictions previously adopted by EPA, is more than adequate to protect the environment and allow the human population to obtain the benefits of these pest control substances. Control of West Nile Virus, protection of forest health, continued functioning of vastly productive irrigated farmlands, and preservation of recreational water bodies are beneficial goals which should not be unnecessarily precluded or hindered simply because of activist litigation and mistaken judges.

On behalf of my clients and the member state associations of the National Water Resources Association, I strongly urge passage of H.R. 1749.

Thank you for the opportunity to address you on this critical piece of legislation.